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# The Implications of Shelby County v. Holder: How the Supreme Court Undid Fifty Years of Social Progression

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The Implications of *Shelby County v. Holder*: How the Supreme Court Undid Fifty Years  
of Social Progression  
Ryan Post\*

**I. Introduction**

In 2006, for the fourth time since its passage, Congress reauthorized the Voting Rights Act of 1965 for an additional twenty-five years.<sup>1</sup> In an era marked by Congressional gridlock, the vote was unusually lopsided; the reauthorization passed the Republican-controlled House of Representatives<sup>2</sup> by a vote of 390-33 and the Republican-controlled Senate<sup>3</sup> by a vote of 98-0<sup>4</sup> before being signed into law by a Republican President.<sup>5</sup> In reauthorizing the Act, Congress explained:

[V]estiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process. . . . The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.<sup>6</sup>

Congress reauthorized the Act with little controversy. In any constitutional democracy, one of the overriding jobs of national legislators is to protect everyone's right to vote, as it makes up the backbone of our representative government. In the most basic sense, protecting each citizen's right to vote means ensuring that all citizens, regardless

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<sup>1</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620–2621 (2013).

<sup>2</sup> *Congress Profiles*, HISTORY, ART, AND ARCHIVES: THE UNITED STATES HOUSE OF REPRESENTATIVES (Nov. 22, 2013, 11:12 PM), <http://history.house.gov/Congressional-Overview/Profiles/109th/>.

<sup>3</sup> *Party Division in the Senate, 1789-Present*, ART AND HISTORY: THE UNITED STATES SENATE (Nov. 22, 2013, 11:12 PM), [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm).

<sup>4</sup> *Bush Signs Voting Rights Act Extension*, NBC NEWS (July 27, 2006), <http://www.nbcnews.com/id/14059113/#.UjRITBbvUUs>.

<sup>5</sup> *Id.*

<sup>6</sup> Fannie Lou Hammer, Rosa Parks, & Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act of 2006, 109 P.L. 246 (2013) [hereinafter Voting Rights Act Reauthorization].

of their skin color, are given the right to cast a ballot. Protection of the right to vote also means, however, that every vote is given equal weight and no policies are put in place that may dilute the strength of the votes cast by minorities. Nearly 94% of Congressmen held this belief in 2006.<sup>7</sup> The overwhelming support for voting equality suggested that while our partisan politics may have caused disagreements on many issues, the sacred right to vote was kept out of the game of political brinksmanship.

The social progress made since the Voting Rights Act's passage and subsequent reauthorizations came to a screeching halt in June of 2013 when the Supreme Court handed down its opinion in *Shelby County v. Holder*.<sup>8</sup> In that decision, five unelected members of the United States Supreme Court disregarded the express will of 488 of the people's representatives and struck a major blow against America's seminal piece of civil rights legislation.

This Comment begins with a brief overview of the Voting Rights Act in Section II. Section III analyzes the *Shelby County* decision itself. Justice Roberts's majority opinion contains six major reasons that justify the Chief Justice's holding; this Comment will examine each reason in depth. Section III also offers a detailed exploration of Justice Ginsburg's rebuttals to each of the majority's key arguments. Section IV contains a brief discussion of Justice Thomas's concurrence.

Section V argues that the federal government still plays a role in regulating state-level elections, a concept dismissed by the majority. This section examines past decisions dealing with federal regulatory involvement in state elections, both generally and specifically relating to the Voting Rights Act.

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<sup>7</sup> *Bush Signs Voting Rights Act Extension*, NBC NEWS (July 27, 2006), <http://www.nbcnews.com/id/14059113/#.UjRITBbvUUs>.

<sup>8</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

Section VI attempts to rebut Justice Roberts’s argument that the Voting Rights Act is no longer necessary because minorities presently have equal access to the polls and stated-based discriminatory voting policies are a thing of the past. As such, Justice Roberts argues that the express will of Congress should be ignored. To rebut, this Section explores the idea of *second-generation barriers* as a modern-day obstacle to voting for minority citizens.

In Section VII, this Comment argues that Congress must pass a new and improved Voting Rights Act for the twenty-first century. As the *Shelby County* opinion makes clear, Congress is free to fill the void created by the decision by updating Section Four to reflect present-day circumstances. Congress should seize this opportunity to strengthen the 1965 Act by adding provisions explicitly prohibiting vote dilution and other recently-created, second-generation barriers.

## **II. Brief Overview of the Voting Rights Act**

In order to understand the significance of the *Shelby County* decision, one must first understand the Voting Rights Act itself and its major provisions. The Voting Rights Act of 1965 is made up of several sections, three of which are significant for the purposes of this Comment. The first section to consider is Section Two of the Voting Rights Act of 1965, codified at 42 U.S.C 1973. It states:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.] . . . A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) [minority voters] in that its members have less opportunity than other members of the

electorate to participate in the political process and to elect representatives of their choice.<sup>9</sup>

The Court did not touch this provision; instead, the Court said Section Two is “permanent, applies nationwide, and is not at issue in this case.”<sup>10</sup> As will be shown later, however, Section Two is only a limited remedy for minorities who have had their vote either taken away or diminished by state policies and does not, by itself, give rise to the institutional progress created by the original Voting Rights Act.

The other two sections of the Act that are important for our purposes are Sections Four and Five. Section Four established a pre-clearance formula that identified states who had taken away and/or diluted minority voting rights.<sup>11</sup> At the time of original passage of the Voting Rights Act, Section Four states included those states that had “maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election.”<sup>12</sup> The states identified under this formula in 1965 were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.<sup>13</sup>

Section Four’s formula identified states that were subject to the Voting Rights Act provisions. Section Five mandated that those Section Four states needed to seek federal approval for any proposed change in their state-based voting procedures.<sup>14</sup> In its decision, the Court found Section Four unconstitutional as an-out-of date formula that no longer applied to present day circumstances.<sup>15</sup> Because Section Five only applies to

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<sup>9</sup> 42 U.S.C.A. § 1973 (West 2013).

<sup>10</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>11</sup> *Id.* at 2618.

<sup>12</sup> *Id.* at 2619.

<sup>13</sup> *Id.* at 2620.

<sup>14</sup> *Id.* at 2618.

<sup>15</sup> *Id.* at 2627 (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)) (“By 2009, however, we concluded that the ‘coverage formula raise[d] serious constitutional questions.’ . . . As

states identified under Section Four’s formula, the ruling also indirectly neutralized Section Five.

### **III. *Shelby County v. Holder***

The issue in *Shelby County* was whether Section Four of the Voting Rights Act was unconstitutional.<sup>16</sup> The Court, in a 5-4 decision, held that it was.<sup>17</sup> Although it only invalidated one Section, the decision spells the death knell of the Voting Rights Act without Congressional intervention.

The majority opinion is both misguided and an improper application of pertinent law. This section analyzes six justifications that the majority gives for its holding, and then discusses why each one of them is flawed.

First, Chief Justice Robert’s assertion that the Voting Rights Act is no longer a necessary burden on states’ rights due to the parity in racial voting is an overly simplistic analysis of the data that refuses to take into account the effect the Voting Rights Act has on those numbers.<sup>18</sup>

Second, the majority’s reasoning that the law was meant to be temporary and nearly fifty years of its existence is far more than what was originally intended is met with an analysis of the “rational basis test,” the standard the court must use to invalidate a law of this nature.<sup>19</sup> Because Congress’s 2006 reauthorization expressly recognized a

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we explained, a statute’s ‘current burdens’ must be justified by ‘current needs,’ and any ‘disparate geographic coverage’ must be ‘sufficiently related to the problem that it targets.’ . . . The coverage formula met that test in 1965, but no longer does so.”)

<sup>16</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>17</sup> *Id.*

<sup>18</sup> *Shelby Cnty.*, *infra* notes 33–34.

<sup>19</sup> *Shelby Cnty.*, *infra* note 46.

continued need for the law,<sup>20</sup> the Court demonstrated improper activism in reaching this holding.

Third, the Chief Justice asserts that southern states today will not discriminate against their minority citizens through their voting laws should the Voting Rights Act fall.<sup>21</sup> A quick look at Department of Justice statistics, however, shows this is not the case.<sup>22</sup>

Fourth, the majority's reasoning that equal sovereignty demands the law be held unconstitutional is an improper application of that doctrine.<sup>23</sup>

Fifth, Chief Justice Roberts similarly asserts a Tenth Amendment argument to support his conclusion that the Voting Rights Act is an improper intrusion on states' rights.<sup>24</sup> While not discussed in this section because Justice Ginsburg did not directly address it, the rebuttal to the Chief Justice's argument occurs in Section IV-D, *infra*, where it is demonstrated that the Chief Justice's interpretation of Tenth Amendment jurisprudence is unsound.

Finally, the majority takes note in their opinion that it left Section Two of the Voting Rights Act intact as a remedy for individuals who feel that their state voting laws unfairly discriminate against them.<sup>25</sup> While Section Two does remain intact, it is an insufficient remedy to combat statewide institutional discrimination.<sup>26</sup>

#### A. The Voting Rights Act and the State of Voting Today

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<sup>20</sup> Voting Rights Act Reauthorization, *supra* note 6.

<sup>21</sup> Shelby Cnty., *infra* note 55.

<sup>22</sup> Shelby Cnty., *infra* note 58.

<sup>23</sup> Katzenbach, *infra* note 66.

<sup>24</sup> Ashcroft, *infra* note 72.

<sup>25</sup> Shelby Cnty., *infra* note 76.

<sup>26</sup> Shelby Cnty., *infra* note 77.

The majority invalidated Section Four of the Voting Rights Act on the grounds that the formula is: (1) out of date; (2) reflective of circumstances as they existed in 1965, rather than 2013, and (3) no longer necessary.<sup>27</sup> The majority supports this finding by looking at voter turnout numbers in the six states originally covered by Section Four when the act was passed in 1965.<sup>28</sup> The Court examines the percentage of registered white and black voters in 1965 and compares that to the percentage of white and black voters registered in 2004, two years before the Voting Rights Act reauthorization.<sup>29</sup> The numbers, as laid out in the opinion are found below<sup>30</sup>:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

A surface look at these numbers seemingly supports the majority's conclusion that the Voting Rights Act, a law put in place to ensure equal access to the polls regardless of race, has accomplished its goal and, thus, is no longer necessary. Justice Roberts has long believed in the present day uselessness of the Voting Rights Act. In his 2009 decision in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, a case that seriously called into question the continued constitutionality of the Voting Rights Act, Justice Roberts noted: "Things have changed in the South. Voter turnout and registration

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<sup>27</sup> *Shelby Cnty.*, 133 S. Ct. at 2612 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.").

<sup>28</sup> *Shelby Cnty.*, *infra* note 30.

<sup>29</sup> *Shelby Cnty.*, *infra* note 31.

<sup>30</sup> *Shelby Cnty.*, 133 S. Ct. at 2626 (citing S. REP. NO. 109-295, at 11 (2006) and H.R. REP. NO. 109-478, at 12 (2006)).



rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>31</sup>

While agreeing that things have improved, Justice Ginsburg draws in her dissent a drastically different conclusion from these numbers. Justice Ginsburg views the closing of the racial gap in voter registration as proof that the Voting Rights Act is working exactly the way in which it was intended.<sup>32</sup> Underpinning this view, Justice Ginsburg points out that since the Act’s inception, the Department of Justice (DOJ) has blocked over 1,000 proposed state-wide changes to voting procedures in Section Four covered jurisdictions.<sup>33</sup> In fact, the DOJ had blocked more proposed changes as discriminatory between 1982 and 2004 (626) than it did between 1965 and 1982 (490).<sup>34</sup> Rather than demonstrating the present-day uselessness of the Voting Rights Act, Justice Ginsburg believes these numbers show that if covered jurisdictions no longer need to seek federal approval to change their voting procedures, those objectionable changes once blocked by the DOJ will go into effect, thus increasing the racial gap in voter registration numbers to pre-1965 levels.<sup>35</sup>

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<sup>31</sup> *Id.* at 2618 (citing *Northwest Austin*, 557 U.S. 193).

<sup>32</sup> *Id.* at 2642 (Ginsburg, J., dissenting) (“True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it.”).

<sup>33</sup> *Id.* at 2639 (Ginsburg, J., dissenting) (citing 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109<sup>th</sup> Cong., 2d Sess., p. 172 (2006)).

<sup>34</sup> *Shelby Cnty.*, 133 S. Ct. at 2639.

<sup>35</sup> *Id.* at 2640 (Ginsburg, J., dissenting) (“The number of discriminatory changes blocked or deterred by the pre-clearance requirement suggests that the state of voting rights in covered jurisdictions would have been significantly absent this remedy.”).

In the preamble to its 2006 reauthorization, Congress similarly demonstrated its belief in a continued need for the Voting Rights Act.<sup>36</sup> In its reauthorization, Congress described the purpose of the Act as follows:

The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.<sup>37</sup>

Justice Ginsburg found it of vital importance that Congress, by overwhelmingly reauthorizing the Act in 2006, explicitly found that the Act remains necessary to protect minority voting interests. Justice Ginsburg believed the Court cannot summarily dismiss such overwhelming legislative support for the continued existence of the Act.<sup>38</sup> Citing precedent, Justice Ginsburg noted: “The Court’s role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that ‘Congress could rationally have determined that [its chosen] provisions were appropriate methods.’”<sup>39</sup>

Justice Ginsburg believed that juridical precedent dictates that as long as Congress’s law is rationally related to a legitimate end—in this case, enforcing the Fifteenth Amendment right to vote, regardless of race—the Court should not overturn enacted legislation.<sup>40</sup> Because the “rationally related” standard is extremely deferential to Congress, Justice Ginsburg’s argued that Congress’s finding of the continued need for a

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<sup>36</sup> Voting Rights Act Reauthorization, *supra* note 6.

<sup>37</sup> *Id.* at § 2(b)(9).

<sup>38</sup> *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting) (“When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.”).

<sup>39</sup> *Id.* at 2638 (Ginsburg, J., dissenting) (citing *City of Rome v. United States*, 446 U.S. 156, 176–177 (1980)).

<sup>40</sup> *Id.*

Voting Rights Act, despite significant improvements in minority voter turnout numbers, should not be disturbed by the Court because the pre-clearance requirements are indeed rationally related to the enforcement of the Fifteenth Amendment.

The critically important decision to change voting procedures in a self-governing society is one that should not be made by nine unelected, unaccountable judges. Rather, elected officials are more competent to make such an important decision because they are answerable directly to the people and have seen first hand the positive role the Voting Rights Act has had in ensuring the bedrock principle of a democratic society—one person, one vote—remains true in our time. The people, through their representatives, have clearly spoken and have found a continued need for the Act.<sup>41</sup> The Court’s role, then, is to show deference.

B. The Idea that the Law was Always Meant to be Temporary

After discussing that the pre-clearance requirement was no longer necessary given the state of voting today, the majority transitioned to another reason for their holding—that the drafters of the law meant it to be a temporary fix to combat the extraordinary problem of institutionalized racism in state voting procedures.

In *South Carolina v. Katzenbach*, the first time the court upheld the statute, the Court pointed to the extraordinary measures employed by the legislation: “This [Act] may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.”<sup>42</sup> Though the Court found the law to be necessary in 1966, it did not envision it as a permanent fixture in our society.

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<sup>41</sup> Voting Right Act Reauthorization, *supra* note 6.

<sup>42</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

The Court further noted the temporary nature of the law in *Northwest Austin*, where it claimed:

As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in *Katzenbach*, explaining that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”<sup>43</sup> We concluded that the problems Congress faced when it passed the Act were so dire that “exceptional conditions [could] justify legislative measures not otherwise appropriate.”<sup>44</sup>

Combining these key points, the majority suggests that the Act was a temporary solution for problems that no longer exist today.<sup>45</sup>

Justice Ginsburg, in dissent, argued that it is irrelevant to the law’s constitutionality whether the Framers of the Act felt it should be a temporary fix to an extraordinary problem; the key is whether Congress, in its 2006 reauthorization, still had a rational basis for renewing the law.<sup>46</sup> The rational basis test says that as long as the government has a legitimate public interest in mind that is rationally related to its disparate treatment of states, the Court will uphold the law at issue.<sup>47</sup> Justice Ginsburg wrote that the Court has not been faithful to this test in striking the law, especially given the evidence that states currently covered under the pre-clearance requirement have

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<sup>43</sup> *Id.* at 308.

<sup>44</sup> *Id.* at 822.

<sup>45</sup> *Shelby Cnty.*, 133 S. Ct. at 2618 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”).

<sup>46</sup> *Id.* at 2637–38 (“Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. *Katzenbach* supplies the standard of review: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”) (Ginsburg, J., dissenting) (quoting *Katzenbach*, 383 U.S. at 324).

<sup>47</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

attempted continuously to institute discriminatory practices in voting procedures.<sup>48</sup> Evidence of these discriminatory practices will be discussed later in the Comment.<sup>49</sup> For a law enacted by Congress to withstand judicial scrutiny under a rational basis standard, the Framers of the Act's intent regarding the law's the time frame is irrelevant. Rather, all that is necessary is for the Court to determine that the means chosen by Congress somehow rationally relate to a legitimate end—in this case, ensuring that all citizens, regardless of their skin color, have an equal vote in the democratic process.<sup>50</sup>

### C. The Pre-Clearance Formula and Present Day Circumstances

Justice Roberts, and the rest of the majority, believed that the pre-clearance formula was outdated and unfairly targeted states that, while they may have instituted discriminatory procedures nearly fifty years ago, no longer had such policies, and thus should not be burdened by federal regulations whenever they want to change their local voting procedures.<sup>51</sup> Justice Roberts pointed to the election of minority candidates in unprecedented numbers, the complete prohibition on voting tests throughout the country, and the lack of disparity in racial voter registration numbers in covered jurisdictions as

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<sup>48</sup> *Shelby Cnty.*, 133 S. Ct. at 2650 (“The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States.). See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (legislative record “mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years”). (“No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress’ bailiwick.”) (Ginsburg, J., dissenting).

<sup>49</sup> See *infra* Part VI-C.

<sup>50</sup> *Shelby Cnty.*, 133 S. Ct. at 2638. (“So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end”) (Ginsburg, J., dissenting).

<sup>51</sup> *Id.* at 2638–39 (“By the time the Act was reauthorized in 2006 . . . voting tests were abolished, disparities in voter registration and turn-out were erased, and African Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”).

the foundation for his belief that southern states no longer discriminate as they once did.<sup>52</sup> Because Justice Roberts believed that, “[a] statute’s current burdens must be justified by current needs,”<sup>53</sup> and that “[c]overage today is based on decades old data and eradicated practices,”<sup>54</sup> Justice Roberts felt justified in striking the law as containing an out-of-date pre-clearance formula unreflective of present day circumstances.<sup>55</sup>

Justice Ginsburg, on the other hand, fundamentally disagreed with the majority that the practices southern states once employed have been eradicated.<sup>56</sup> Citing successful Section Two litigation in the country—litigation under the Voting Rights Act that allows individuals and the federal government to bring suit against a state’s voting procedures as discriminatory after they are implemented<sup>57</sup>—Justice Ginsburg noted:

Although covered jurisdictions account for less than 25 percent of the country’s population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. . . . Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered jurisdictions. . . . The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. . . . From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>54</sup> *Shelby Cnty.*, 133 S. Ct. at 2627.

<sup>55</sup> *Id.* at 2638–39 (“By the time the Act was reauthorized in 2006 . . . voting tests were abolished, disparities in voter registration and turn-out were erased, and African Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”).

<sup>56</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2643 (2013) (*quoting* *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)) (“racial discrimination in voting remains ‘concentrated in the jurisdictions singled out for pre-clearance.’”). (Ginsburg, J., dissenting).

<sup>57</sup> 42 U.S.C. § 1973 (2013).

<sup>58</sup> *Shelby Cnty.*, 133 S. Ct. at 2643.

Using the same numbers presented to Congress when they overwhelmingly decided to reauthorize the Act in 2006,<sup>59</sup> Justice Ginsburg rebuked the majority's theory that the pre-clearance formula unfairly targeted states presently based on their actions nearly fifty years ago, when the law was originally enacted.

#### D. Equal Sovereignty Principals

Justice Roberts also cited equal sovereignty as a key reason for striking the Act.<sup>60</sup> The Court previously held that, “[a] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>61</sup> Because the majority believed the government did not make that showing in *Shelby County*,<sup>62</sup> the Court concluded that the Act’s violation of equal sovereignty principles creates Constitutional problems.<sup>63</sup> Justice Roberts justified his view that the principal of equal sovereignty is so important by noting:

While one state waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued [under Section Two], there are important differences between those proceedings and pre-clearance proceedings; the pre-clearance proceeding not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.<sup>64</sup>

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<sup>59</sup> Voting Rights Act Reauthorization, *supra* note 6.

<sup>60</sup> *Shelby Cnty.*, 133 S. Ct. at 2623 (quoting *Northwest Austin*, 557 U.S. at 203 (“Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal* sovereignty’ among the States.”)).

<sup>61</sup> *Northwest Austin*, 557 U.S. at 203.

<sup>62</sup> *Shelby Cnty.*, *supra* note 27.

<sup>63</sup> See *Coyle v. Smith*, 221 U.S. 559, 567, 580 (1911) (Our nation “was and is a Union of States, equal in power, dignity, and authority . . . the constitutional equality of the States is essential to the harmonious operation on the scheme upon which the Republic was organized.”).

<sup>64</sup> *Shelby Cnty.*, 133 S. Ct. at 2624.

Justice Ginsburg responded by pointing out that the majority in this case has perverted the meaning behind equal sovereignty.<sup>65</sup> Justice Ginsburg pointed to *South Carolina v. Katzenbach*, which plainly stated, “[t]he doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”<sup>66</sup> By applying equal sovereignty to voting rights, the Court is “attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*.”<sup>67</sup> As Justice Ginsburg argued, equal sovereignty principles should have no bearing on the constitutionality of the Voting Rights Act.

Additionally, Justice Ginsburg noted several instances in her dissent where the federal government treats states differently.<sup>68</sup> After listing several long-standing statutes, Justice Ginsburg poignantly asks whether these laws are now constitutionally suspect under the majority’s unwarranted expansion of the doctrine of equal sovereignty.<sup>69</sup>

#### E. The Tenth Amendment

Justice Roberts also points to the Tenth Amendment<sup>70</sup> as justification for his argument that states are the creators of local voting procedures without interference from Washington.<sup>71</sup> Justice Roberts asserts that states have significant power under the Tenth Amendment to determine the voting procedures for local elections.<sup>72</sup> To support this

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<sup>65</sup> *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J. dissenting) (“Today’s unprecedented extension of the equal sovereignty principle outside its proper domain . . . is capable of much mischief.”).

<sup>66</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328-329 (1966).

<sup>67</sup> *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J. dissenting).

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 2649 (Ginsburg, J. dissenting).

<sup>70</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

<sup>71</sup> *Shelby Cnty.*, 133 S. Ct. at 2623.

<sup>72</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 461–462 (1991) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970)).



proposition, Justice Roberts cites the 1991 decision, *Gregory v. Ashcroft*, which said: “The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”<sup>73</sup> Tenth Amendment principles, then, further Justice Roberts’s states’ rights argument regarding the regulation of local elections.

Although Justice Ginsburg does not specifically address the Tenth Amendment issue in her dissent, this Comment addresses this issue in Section IV-D, *infra*. It is worth mentioning at this time, however, that *Oregon v. Mitchell*, the case underpinning Justice Roberts’s Tenth Amendment argument, was actually a case that *upheld* the constitutionality of the Voting Rights Act’s provision banning literacy tests as a prerequisite to voting.<sup>74</sup> The quote above referenced the state’s ability, free from federal intrusion, to set the age requirement for local elections.<sup>75</sup> Because the Voting Rights Act makes no mention of age requirements in state-based elections, Justice Roberts’s opinion does not support the conclusion that the Tenth Amendment shields the states from provisions of the Voting Rights Act.

#### F. Section Two as a Remedy

After exhausting all justifications for striking the law, Justice Roberts reiterates that his holding leaves Section Two unchanged. As such, he argues, the law still prevents the states from employing any discriminatory voting practices.<sup>76</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Mitchell*, 400 U.S. 112.

<sup>75</sup> *Id.*

<sup>76</sup> *Shelby Cnty.*, 133 S. Ct. at 2619 (“Both the Federal Government and individuals have sued to enforce §2 . . . and injunctive relief is available in appropriate cases to block voting laws from going into effect . . . Section 2 is permanent, applies nationwide, and is not at issue in this case.”).

Justice Ginsburg, however, disagrees with the conclusion that the continued existence of Section Two will overcome the impact of striking Sections Four and Five of the Voting Rights Act. Looking back to the evidence received by Congress during the 2006 reauthorization proceedings, Justice Ginsburg noted:

Litigation under §2 of the VRA [is] an inadequate substitute for pre-clearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it. And litigation places a heavy financial burden on minority voters.<sup>77</sup>

Because Congress found there was still a need for the Section Four and Five pre-clearance requirements and because such a finding was rationally related to the legitimate end of ensuring equal access to the polls, the Court, in Justice Ginsburg's view, failed to show the proper deference to Congress—as called for by the rational basis review standard—when it struck the law.<sup>78</sup>

For the reasons laid out above, Chief Justice Roberts and the majority were wrong in diminishing the Voting Right Act to little more than a symbolic reminder of a once truly democratic society.

#### **IV. Justice Thomas's Concurrence in *Shelby County v. Holder***

Although this Comment's main focus is the interplay between the majority and dissent, it is important to note that Justice Thomas singularly concurred in the opinion. The majority held that Section Four's pre-clearance requirement was unconstitutional, as

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<sup>77</sup> *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J. dissenting).

<sup>78</sup> *Id.* at 2636 (Ginsburg, J., dissenting) (“It is well established that Congress’ judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference.”).

*it currently existed*, for the reasons listed above.<sup>79</sup> The Court did say, however, that if Congress wished to update the pre-clearance formula to reflect current conditions, it would not violate Constitutional principles.<sup>80</sup> If that were to happen, Section Five's provision that the federal government must approve any changes to covered jurisdictions would once again become effective.<sup>81</sup> The Court did not actually find Section Five unconstitutional;<sup>82</sup> it merely took away that section's meaning by striking Section Four as it currently stood. If there is no pre-clearance formula, there can be no identifiable jurisdictions to comply with any Section Five requirements.

Justice Thomas, on the other hand, argued it was an unconstitutional intrusion on states' rights to force them to submit their voting policies to the federal government for approval prior to their enactment because racially-based voting policies aimed at keeping minorities from voting no longer exist.<sup>83</sup> As such, Justice Thomas would have found Section Five unconstitutional and completely shut the door on the Voting Rights Act that the majority left slightly ajar by keeping Section Five intact.<sup>84</sup> Though Justice Thomas's opinion is a unique position, no justices joined the concurrence and, thus, his opinion will likely have little weight in future jurisprudence on this issue.

## **V. The Federal Government's Role in State Elections**

### **A. The Fifteenth Amendment**

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<sup>79</sup> *Shelby Cnty.*, 133 S.Ct. at 2627 (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 557 U.S. 193 (2009)) ("By 2009, however, we concluded that the 'coverage formula raise[d] serious constitutional questions.' . . . As we explained, a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.' . . . The coverage formula met that test in 1965, but no longer does so.")..

<sup>80</sup> *Shelby Cnty.*, 133 S. Ct. at 2631 ("Congress may draft another formula based on current conditions.").

<sup>81</sup> 42 U.S.C. § 1973 (2013).

<sup>82</sup> *Id.* ("We issue no holding on § 5 itself.").

<sup>83</sup> *Shelby Cnty.*, 133 S. Ct. at 2632 (quoting *Northwest Austin*, 557 U.S. 193 (2009)) (Thomas, J., concurring in judgment in part and dissenting in part) ("The extensive pattern of discrimination that led the Court to previously uphold §5 as enforcing the Fifteenth Amendment no longer exists.").

<sup>84</sup> *Id.* at 2632.

One of the majority's major arguments regarding the Voting Rights Act is that the Act is an unwarranted and unconstitutional intrusion on states' right to regulate their own elections.<sup>85</sup> This conclusion, however, does not square with the Constitution—specifically the Fifteenth Amendment.<sup>86</sup> A simple reading of the Fifteenth Amendment's text indicates that the Framers clearly intended to give Congress the power to ensure everyone has equal access to the polls. Justice Ginsburg agrees: "The stated purpose of the Civil War Amendments [which includes the Fifteenth Amendment] was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States."<sup>87</sup>

Justice Ginsburg's view of the Fifteenth Amendment is consistent with Supreme Court precedent, specifically the landmark case of *Guinn v. United States*.<sup>88</sup> At issue in *Guinn* was a provision in the Oklahoma Constitution that instituted a literacy test as a prerequisite to voting. Voters were exempted from the literacy test, however, if their grandfathers had been entitled to vote as of January 1, 1866, which was prior to the adoption of the Fifteenth Amendment.<sup>89</sup> While this appeared to be a harmless provision, in reality only white voters were entitled to vote in 1866; very few, if any, black people were able to vote. Therefore, under this constitutional mandate, white voters were exempted from the literacy tests, while a large majority of blacks were not. The Court

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<sup>85</sup> *Id.* at 2623 ("The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect.").

<sup>86</sup> U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."); U.S. CONST. amend. X, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

<sup>87</sup> *Shelby Cnty.*, 133 S. Ct. at 2637 (Ginsburg, J. dissenting).

<sup>88</sup> *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>89</sup> *Id.*

held that this provision violated the Fifteenth Amendment as an unlawful obstacle to minority voting rights and struck it down.<sup>90</sup>

The majority's argument that the Voting Rights Act is inconsistent with the Constitution, then, seems to ignore the plain text of the Constitution's Fifteenth Amendment. The text of the Amendment, as well as well-established judicial precedent, lead to the conclusion that the federal government does indeed have a large role to play in regulating state-based election procedures.

#### B. A History of Voting Rights Act Jurisprudence

An examination of *stare decisis* as it relates to the Voting Rights Act shows that the federal government has, through the Supreme Court, properly involved itself in state-based elections.<sup>91</sup> An analysis of lower court precedent suggests that the majority's reasoning rests on shaky grounds.

Prior to the *Shelby* decision, the Supreme Court upheld the constitutionality of the Voting Rights Act on four different occasions.<sup>92</sup> The first instance occurred one year after the Act's original passage in *South Carolina v. Katzenbach*.<sup>93</sup> Similar to *Shelby*, *Katzenbach* involved a state-based challenge to the law, claiming the Act "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution."<sup>94</sup> After reviewing the Act itself and a history of Fifteenth Amendment jurisprudence, the Court found, "[a]s against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial

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<sup>90</sup> *Id.* at 362–364.

<sup>91</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *Georgia v. United States*, 411 U.S. 526 (1973), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *City of Rome v. United States*, 446 U.S. 156 (1980), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

<sup>92</sup> See *Katzenbach*, 383 U.S. 301; *Georgia*, 411 U.S. 526; *City of Rome*, 446 U.S. 156; *Lopez*, 525 U.S. 266.

<sup>93</sup> *Katzenbach*, 383 U.S. at 301.

<sup>94</sup> *Id.* at 323.

discrimination in voting.”<sup>95</sup> One year after the Act’s passage, not only did the Court firmly hold the law to be within the bounds of the Constitution, but the Court also did so while showing much deference to Congress by employing the rational basis standard.<sup>96</sup>

Seven years later, in *Georgia v. United States*, the Court once again ruled that the Voting Rights Act was a constitutional exercise of Congressional authority.<sup>97</sup> *Georgia* involved a 1972 reapportionment law, which redrew legislative districts for the state’s House of Representatives.<sup>98</sup> As per the Voting Rights Act, Georgia, as a covered jurisdiction under Section Four,<sup>99</sup> submitted its new law to the Attorney General for approval. The Attorney General, however, objected to the plan and refused to pass the new law.<sup>100</sup> The Attorney General did not object based on an affirmative finding of a discriminatory purpose or effect, but rather the Attorney General simply stated that the plan “does not satisfactorily remove the features found objectionable in [Georgia’s] prior submission [in 1971].”<sup>101</sup> Georgia argued, among other things, that Section Five of the Voting Rights Act does not reach state reapportionment plans and, as such, the Attorney General could not object to the plan.<sup>102</sup> Additionally, Georgia argued that without an affirmative finding that the proposed state plan contained a discriminatory purpose or effect, the Attorney General could not prevent the law from going into effect under

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<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> *Id.*

<sup>97</sup> *Georgia v. United States*, 411 U.S. 526 (1973).

<sup>98</sup> *Id.* at 528.

<sup>99</sup> *Shelby Cnty.*, 133 S. Ct. at 2621 (citing S. REP. NO. 109–295, at 11 (2006); H.R. REP. NO. 109–478, at 12 (2006)).

<sup>100</sup> *Georgia*, 411 U.S. at 534.

<sup>101</sup> Letter from the Assistant Attorney General of the United States to the State of Georgia (Mar. 24, 1972) cited in *Georgia*, 411 U.S. at 530.

<sup>102</sup> *Georgia*, 411 U.S. at 531 (“The State of Georgia claims that § 5 is inapplicable to the 1972 House plan, ... because the Act does not reach ‘reapportionment’ ...”).

Section Five of the Voting Rights Act.<sup>103</sup> The Court held that reapportionment plans were cognizable under Section Five of the Act and restated its 1966 holding in *Katzenbach* that the law is a permissible exercise of Congressional authority under the Fifteenth Amendment.<sup>104</sup> Not only did the Court reaffirm the constitutionality of the law, the majority made it stronger by expanding the subject matter covered by Section Five and allowing the Attorney General to block proposed changes without an affirmative finding of a discriminatory purpose or effect.<sup>105</sup>

The Court once again ruled in favor of the Voting Rights Act seven years later in *City of Rome v. United States*. A political subdivision, the city of Rome in Georgia, submitted its proposed, amended voting law to the Attorney General for approval.<sup>106</sup> The federal government rejected the proposed changes as discriminatory, and the city brought suit, claiming Section Five to be an unconstitutional intrusion by the federal government on states' rights as applied to their proposed changes.<sup>107</sup> In discussing the 1975 extension of the Act, the Court reaffirmed its constitutionality.<sup>108</sup> When applied to the changes sought by Rome, Georgia, the Court found that the Attorney General was within his rights to deny the proposed changes.<sup>109</sup>

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<sup>103</sup> *Id.* (“The State also challenges ... Attorney General's conduct of the § 5 objection procedure, claiming ... that the Attorney General cannot object to a state plan without finding that it in fact has a discriminatory purpose or effect...”).

<sup>104</sup> *Id.* at 526.

<sup>105</sup> *Id.*

<sup>106</sup> *City of Rome v. United States*, 446 U.S. 156, 161 (1980), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

<sup>107</sup> *Id.* at 162.

<sup>108</sup> *Id.* at 182 (“The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.”).

<sup>109</sup> *Id.* at 183 (“We conclude that the District Court did not clearly err in finding that the city had failed to prove that the 1966 electoral changes would not dilute the effectiveness of the Negro vote in Rome.”).

In 1999, the Court reaffirmed that holding in *Lopez v. Monterey County*.<sup>110</sup> California, a state not covered by the Voting Rights Act, “passed legislation altering the scheme for electing judges in Monterey County, California[,] . . . a “covered” jurisdiction required to preclear its voting changes.”<sup>111</sup> California argued that since the state as a whole is not subject to the Voting Rights Act, the state need not submit changes they plan to implement to their voting procedures for review, even if the changes apply to political subdivisions within California that are covered under Section Four.<sup>112</sup> The Court, however, was not persuaded by the argument and held that, even though Monterey County had no part in the enactment of the law, as a covered jurisdiction under Section Four, the jurisdiction would still need to seek pre-clearance for that state-mandated change because it would apply to judges in the county.<sup>113</sup>

The history of litigation concerning the Voting Rights Act shows that not only is the law constitutional, but also the Court has deemed it proper to strengthen and expand the law through common law doctrine. A look at the common law history demonstrates that the majority’s conclusion—that the law is an unwarranted intrusion into the realm of states’ rights—is unfounded.

### C. Federal Involvement in State Elections Outside the Voting Rights Act

Even before the enactment of the Voting Rights Act, the Court upheld federal involvement in state election law through the Equal Protection Clause of the Fourteenth

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<sup>110</sup> *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

<sup>111</sup> *Id.* at 269.

<sup>112</sup> *Id.* at 278 (“The State urges, in response, that § 5 expressly limits its pre-clearance requirements to covered jurisdictions. ‘Partially covered’ jurisdictions like California, the State insists, are under no obligation to comply with § 5.”).

<sup>113</sup> *Id.* (“Because we agree with appellants that a covered jurisdiction ‘seeks to administer’ a voting change even where the jurisdiction exercises no discretion in giving effect to a state-mandated change, we conclude that the Cnty. is required to seek pre-clearance before implementing California laws that effect voting changes in the Cnty..”).



Amendment.<sup>114</sup> In *Harper v. Virginia State Board of Elections*, the Court held that, under the Equal Protection Clause, a state could not institute a poll tax as a prerequisite to voting.<sup>115</sup> Citing equal protection concerns with the state voting policies, the Court concluded:

[T]hat a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.<sup>116</sup>

Another example of the Supreme Court, and by extension the federal government, inserting itself into fights involving state voting procedures outside the purview of the Voting Rights Act is *Reynolds v. Sims*.<sup>117</sup> The court held that the apportionment of legislative districts, based on the 1900 census (the case was decided in 1964), was out of date and not reflective of the population.<sup>118</sup> The challengers to the system argued that the district in question had grown enough in population to be split into two legislative districts, a move that would undo black vote dilution that had occurred by allowing the voting bloc to be placed within a uniquely large, majority-white legislative district.<sup>119</sup> The Court held that the state must redraw the districts and “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”<sup>120</sup>

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<sup>114</sup> U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>115</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

<sup>116</sup> *Id.* at 666.

<sup>117</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 577.

Finally, in *Baker v. Carr*, voters in Tennessee claimed that the apportionment of the Tennessee General Assembly violated their equal protection rights because the districts were not approximately equal in terms of population.<sup>121</sup> The Court held that Tennessee voters had standing to sue the state over the alleged discriminatory drawing of state legislative districts intended to dilute the black vote.<sup>122</sup>

As the aforementioned cases show, the Court has a long history of injecting itself in state-based voting procedures to ensure they square with the Constitution’s Fourteenth and Fifteenth Amendment guarantees. As such, this Comment questions why the majority in *Shelby County* would ignore the Constitution and *stare decisis* by holding that the federal government has little to no role to play in regulating state elections.

#### D. The Tenth Amendment is Not a Shield to Federal Oversight of State Elections

As a foundation for Justice Roberts’s belief that the federal government has no role to play in regulating state elections—in opposition to the civil war amendments and judicial precedent—the Justice points to the language of the Tenth Amendment.<sup>123</sup> But Justice Roberts’s understanding of the Tenth Amendment is misguided here. The Tenth Amendment requires the federal government to refrain from compelling the states to enact regulation and legislation pursuant to a federal goal. It does not, however, prohibit however the federal government from requiring the states to conduct themselves in a certain way in order to comply with federal requirements.<sup>124</sup> This distinction can be found in two relatively recent Court cases—*South Carolina v. Baker* and *Reno v. Condon*. *South Carolina v. Baker* held “[t]hat a State wishing to engage in certain

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<sup>121</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>122</sup> *Id.*

<sup>123</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 461–462 (1991) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970)).

<sup>124</sup> *See South Carolina v. Baker*, 485 U.S. 505 (1988); *Reno v. Condon*, 528 U.S. 141 (2000).

activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no [Tenth Amendment] constitutional defect.”<sup>125</sup>

The Court affirmed this distinction twelve years later in *Reno v. Condon*, when the Court held:

Like the statute at issue in *Baker*, the DPPA [federal law challenged under the Tenth Amendment in this case] does not require the States in their sovereign capacity to regulate their own citizens [in a way mandated by the federal government by enacting laws]. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.<sup>126</sup>

These cases create a distinction regarding the applicability of the Tenth Amendment. Tenth Amendment concerns only manifest when the federal government forces the states to enact laws in conjunction with a federal program.<sup>127</sup> If a federal program only seeks compliance from states with certain regulations without forcing states to enact specific legislation, there are no Tenth Amendment issues.<sup>128</sup> The Voting Rights Act does not force states to enact specific voting procedures, it only denies changes it deems discriminatory and not in compliance with the regulations created by the Act.<sup>129</sup> Covered jurisdictions are still free to enact any voting procedures they deem appropriate, so long as they are not discriminatory.

## **VI. Present Circumstances Regarding Voting Rights**

### **A. Voter Registration Numbers are Misleading**

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<sup>125</sup> *Baker*, 485 U.S. at 514–515.

<sup>126</sup> *Reno*, 528 U.S. at 151.

<sup>127</sup> *Id.*

<sup>128</sup> *Baker*, 485 U.S. at 1362.

<sup>129</sup> 42 U.S.C. § 1973 (2013).

Justice Roberts, along with the majority in this case, proclaim the Voting Rights Act is no longer necessary because the vestiges of discrimination that were rampant during the civil rights period no longer exist today.<sup>130</sup> Justice Roberts interprets the parity in voting numbers today in the covered jurisdictions as a sufficient basis for his conclusion.<sup>131</sup> This conclusion is an overly simplistic view. Even looking strictly at the numbers in 1965 compared to today, one can conclude that racism, bigotry, and prejudice are still major problems in the twenty-first century United States. As one study points out:

Nationwide, African-American voter turnout was approximately 15 percentage points below that of the non-Hispanic white population in 2006, and 12 points below white turnout in 2010. In 2008 and 2012, however, black turnout was within 5 percentage points of white turnout.<sup>132</sup>

A shallow look at these numbers tends to support the majority's conclusion that the Voting Rights Act has solved the problem of states withholding the right to vote from minorities and, as such, is no longer necessary.

A deeper analysis suggests otherwise. Rather than looking at the states as a whole, the study looked deeper into political subdivisions within each state. The study found that the parity in state-wide turnout numbers only exists because the Voting Rights Act called for redistricting in some states that gave blacks who lived in a concentrated area their own legislative district.<sup>133</sup> This redistricting gave them perceived voting power and brought them to the polls, thus boosting their voter turnout numbers.<sup>134</sup> In pre-

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<sup>130</sup> *Shelby Cnty., supra* note 27.

<sup>131</sup> *Id.*

<sup>132</sup> *The SCOTUS Majority Is Missing Exactly What the VRA Sought to Remedy*, <http://themonkeycage.org/2013/06/27/the-scotus-majority-is-missing-exactly-what-the-vra-sought-to-remedy/> (last visited Sept. 15, 2013).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

clearance states that do not have significantly large African American legislative districts, however, the gap between black and white voter turnout is huge.<sup>135</sup>

Further, Justice Roberts fails to realize that the parity in registration numbers proves that the Voting Rights Act continues to work exactly as it is intended. By taking away the Act, the majority has taken away the government's most powerful weapon in ensuring equal access to the polls. Given current Department of Justice numbers, such a weapon is still needed.<sup>136</sup> Since the Act's passage, states have tried to implement voting laws that would have the effect of limiting the minority vote. Thankfully, the Voting Rights Act gave the federal government the power to stop those laws before they were ever implemented. Now that the Act has been gutted, there is every reason to believe these formerly rejected laws will be implemented. As a result, the parity in voter registration numbers will disappear.

#### B. Second-Generation Barriers Continue to Exist

Once the analysis moves beyond hard numbers to comparing the percentage of whites who voted with the percentage of blacks, it becomes clearer that the Voting Rights Act remains a necessity in ensuring fairness in our democracy, specifically to stop more subtle, second-generation barriers that dilute the power of the minority vote. Consider the language of the 2006 reauthorization.<sup>137</sup> Second-generation barriers to voting do not physically keep minorities out of voting booths like literacy tests and poll taxes used to

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<sup>135</sup> *Id.*

<sup>136</sup> 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, *infra* note 146; H.R. REP. NO. 109-478, *infra* note 148.

<sup>137</sup> Voting Rights Act Reauthorization, *supra* note 6 (“[V]estiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”) (emphasis added).

do, but they have the same deleterious effect of silencing people of color in our democratic system.<sup>138</sup> According to Justice Ginsburg:

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an “effort to segregate the races for purposes of voting.”<sup>139</sup> Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority’s votes.<sup>140</sup> A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.<sup>141</sup>

Congress considered evidence that these second-generation barriers continue to exist,<sup>142</sup> and thus overwhelmingly concluded that a Voting Rights Act is still necessary.<sup>143</sup> Justice Roberts and the rest of the majority rejected these extensive findings and nullified a law that Congress, in an unusually bipartisan manner, concluded was still relevant and necessary today.<sup>144</sup>

C. The Voting Rights Act is Working and Present Examples Dictate a Need for Continued Federal Involvement in the Oversight of Elections

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<sup>138</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting) (“Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as ‘second-generation barriers’ to minority voting.”).

<sup>139</sup> *Shaw v. Reno*, 509 U.S. 630, 642 (1993), *cited in* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635 (2013).

<sup>140</sup> GROFMAN & DAVIDSON, *THE EFFECT OF MUN. ELECTION STRUCTURE ON BLACK REPRESENTATION IN EIGHT SOUTHERN STATES*, IN *QUIET REVOLUTION IN THE SOUTH* 301, 319 (C. Davidson & B. Grofman eds. 1994).

<sup>141</sup> *Shelby Cnty.*, 133 S. Ct. at 2635 (2013) (Ginsburg, J., dissenting).

<sup>142</sup> Voting Rights Act Reauthorization, *supra* note 6.

<sup>143</sup> Voting Rights Act Reauthorization, *supra* note 6 (“Without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”).

<sup>144</sup> Congress Profiles, *supra* note 2; *Bush Signs Voting Rights Act Extension*, *supra* note 3.

Present day circumstances dictate a need for federal oversight in elections, specifically in the South. Section Two statistics support this conclusion. As Justice Ginsburg points out, “[a]lthough covered jurisdictions account for less than 25% of the nation’s population . . . they accounted for 56% of successful Section 2 litigation since 1982. . . . Controlling for population, there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in non-covered jurisdictions.”<sup>145</sup> The covered jurisdictions in the South continue to try and restrict minority voter access, whether physically or through vote dilution. Federal oversight of state voting laws, including the Voting Rights Act, continues to serve a relevant purpose. These statistics demonstrate a need to strengthen the Voting Rights Act, not restrict it.

Along with Section Two, the volume of Section Five objections show that we have not come all that far since 1965. In actuality, there were more Department of Justice objections to proposed changes in voting procedures between 1982 and 2004 (626) than there were between 1965 and 1982 (490).<sup>146</sup> Justice Ginsburg cites several examples of such proposed changes in her dissent.<sup>147</sup> In addition, since 1982, over 800 proposed changes to voting procedures in covered jurisdictions were either altered or withdrawn before the Department of Justice had a chance to rule on them.<sup>148</sup>

Statutory analysis does not fully explain why the federal government has a continued role in overseeing state election procedures. Previous case law in Alabama,

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<sup>145</sup> To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005).

<sup>146</sup> 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) *cited in* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J. dissenting).

<sup>147</sup> *See* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2640–41 (2013) (Ginsburg, J. dissenting).

<sup>148</sup> H.R. REP. NO. 109-478, at 40–41.

the home of Shelby County, demonstrated the continued need for federal oversight as a protection of minority voting rights.<sup>149</sup>

In *Pleasant Grove v. United States*, the Court held that Pleasant Grove attempted to dilute the voting power of a bloc of minority voters by annexing all-white areas into the city while refusing annexation requests of largely black areas<sup>150</sup> to provide for the growth of a “monolithic white voting bloc.”<sup>151</sup>

In *Hunter v. Underwood*, the Court “struck down an Alabama Constitutional provision that prohibited anyone convicted of a misdemeanor offense involving moral turpitude from voting.”<sup>152</sup> The Court unanimously concluded the clause’s “original enactment was motivated by a desire to discriminate blacks on account of race.”<sup>153</sup>

In *Dillard v. Crenshaw City* the Court found that the at-large election system in many counties in Alabama has “consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state.”<sup>154</sup>

Finally, in *United States v. McGregor*, the Court found that recorded conversations between Alabama state legislators revealed shocking results. One state lawmaker referred to blacks as “Aborigines.” Another state lawmaker explained that he wanted to keep a gambling initiative off the ballot so as to decrease African American voter turnout.<sup>155</sup>

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<sup>149</sup> See *Pleasant Grove v. United States*, 479 U.S. 462 (1987); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347 (M.D. Ala. 1986); *United States v. McGregor*, 824 F. Supp. 2d 1339 (M.D. Ala. 2011).

<sup>150</sup> *Pleasant Grove v. United States*, 479 U.S. 462 (1987).

<sup>151</sup> *Id.* at 472.

<sup>152</sup> *Shelby Cnty.*, 133 S. Ct. at 2646 (Ginsburg, J. dissenting).

<sup>153</sup> *Hunter*, 471 U.S. at 233.

<sup>154</sup> *Dillard*, 640 F. Supp. at 1360.

<sup>155</sup> *McGregor*, 824 F. Supp. 2d at 1339.



While Justice Roberts may believe that institutionalized racism in the form of unfair statewide voting laws no longer exists,<sup>156</sup> the facts paint a starkly different picture. This is the picture Congress saw in 2006 when it overwhelmingly reauthorized the Act,<sup>157</sup> and the picture the majority willfully ignored in coming to its holding.

D. Since the Heart of the Voting Rights Act was Struck Down, States Have Already Begun to Implement Laws that Would Have Been Blocked Under Section Five

Once the Court's opinion was handed down, several states formerly covered under Section Five have started implementing laws that will weaken the minority vote. Texas is one of those states. For example, Texas had previously tried to implement a voter identification ("ID") law in the state, but the law was blocked under Section Five.<sup>158</sup> When *Shelby County* came down, Texas was freed from Section Five's requirements and, therefore, the state had the unhindered power to implement any changes into its voting laws it deemed appropriate. As such, it passed the previously blocked voter ID law. Now, in order to vote in Texas, one must present a Texas driver license issued by the Texas Department of Public Safety (DPS), Texas Election Identification Certificate issued by DPS, Texas personal identification card issued by DPS, Texas concealed handgun license issued by DPS, United States military identification card containing the person's photograph, United States citizenship certificate containing the person's photograph, or a United States passport.<sup>159</sup>

Texas argues such a law is necessary to prevent voter fraud. The facts, however, say otherwise: "[o]ver the past decade, Texas has convicted 51 people of voter fraud. . . .

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<sup>156</sup> *Shelby Cnty.*, *supra* note 51.

<sup>157</sup> Voting Rights Act Reauthorization, *supra* note 6.

<sup>158</sup> *Texas Voter ID Law Implemented*, THE HILLSBORO REPORTER, <http://hillsbororeporter.com/texas-voter-id-law-implemented-p16482-54.htm>.

<sup>159</sup> *Id.*

Only four of those cases were for voter impersonation, the only type of voter fraud that voter ID laws prevent.”<sup>160</sup> Given all of the objective facts—the federal government previously blocked the law as discriminatory, it is harder for people of color to get proper photo identification than white people, and voter fraud is a statistically insignificant problem in the state—one begins to wonder whether this law is really in effect to weaken the minority vote in Texas.

Texas is not the only state to quickly change its laws following the *Shelby County* decision. Alabama, another previously-covered jurisdiction and one with a recent history of discrimination,<sup>161</sup> followed suit by requiring voters to present a valid ID before they can vote.<sup>162</sup> This law “place[s] its largest burden on black voters who lack acceptable forms of identification and don’t have immediate access to alternatives.”<sup>163</sup> As an additional burden, the law forces citizens to get a brand new ID card whenever they move within the state.<sup>164</sup> Once again, this provision burdens poor, minority voters more than any other group.<sup>165</sup>

North Carolina also quickly amended its voting laws following *Shelby County* as well. The North Carolina law makes several changes. First, “[t]he bill requires voters to show government-issued ID, shortens early voting [from seventeen days to ten days] and

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<sup>160</sup> Amy Bingham, *Voter Fraud: Non-existent Problem or Election Threatening Epidemic?*, ABC NEWS (Sept. 12, 2012), <http://abcnews.go.com/Politics/OTUS/voter-fraud-real-rare/story?id=17213376>.

<sup>161</sup> See *supra* note 149.

<sup>162</sup> Kim Chandler, *Alabama Voter Photo ID Law to be Used in 2014, State Officials Say* (June 26, 2013, 12:43 PM), [http://blog.al.com/wire/2013/06/alabama\\_photo\\_voter\\_id\\_law\\_to.html](http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html).

<sup>163</sup> Jamelle Bouie, *Republicans Admit Voter-ID Laws are Aimed at Democratic Voters*, <http://www.thedailybeast.com/articles/2013/08/28/republicans-admit-voter-id-laws-are-aimed-at-democratic-voters.html> (last visited Feb. 5, 2014).

<sup>164</sup> *Voter ID Laws Passed Since 2011*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/analysis/voter-id-laws-passed-2011>.

<sup>165</sup> Gaskins & Iyer, *infra* note 173–177.

ends early pre-registration for teens, among other changes.”<sup>166</sup> In addition, the bill stops same day registration and forces voters to either register or make needed changes to their registration at least twenty-five days before the election. Further, a state-wide high school program that registers students in advance of their eighteenth birthday will be eliminated.<sup>167</sup> Next, the law prohibits straight-ticket voting, which has been in place since 1925.<sup>168</sup> Straight-ticket voting allows voters to vote for all candidates from the same party with one punch or mark on the ballot.<sup>169</sup> While neutral on their fact, these laws are aimed at preventing uneducated, poor, minority citizens from exercising the right to vote.

Mississippi also was quick to change its voting law post-*Shelby County*. Under the new law, the newly non-covered jurisdiction requires all citizens to show an acceptable form of ID to vote. Acceptable forms of ID include: a Mississippi driver’s license; a photo ID card issued by a branch, department, or agency of Mississippi’s government; a U.S. passport; a U.S. or Mississippi state or local government employee photo ID; a Mississippi firearm license; a student photo ID issued by a Mississippi college, university, or community college; a U.S. military ID; or, a tribal photo ID.<sup>170</sup>

One common fact among all these states with a history of institutionalized discrimination is the presence of a voter ID law, a law that studies and statistics show adversely affects people of color more than white people. Although these states claim

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<sup>166</sup> *Colin Powell Slams North Carolina Voting Law*, POLITICO (Sept. 15, 2013)

<http://www.politico.com/story/2013/08/colin-powell-north-carolina-voting-law-95813.html>.

<sup>167</sup> *North Carolina Voter ID Bill Passes In State's GOP-Dominated House*, HUFFINGTON POST (Sept. 15, 2013), [http://www.huffingtonpost.com/2013/07/25/north-carolina-voter-id-bill\\_n\\_3656084.html](http://www.huffingtonpost.com/2013/07/25/north-carolina-voter-id-bill_n_3656084.html).

<sup>168</sup> *Id.*

<sup>169</sup> *House bill would end straight-ticket voting in federal elections*, THE HILL (Sept. 15, 2013), <http://thehill.com/blogs/floor-action/house/286187-moderates-look-to-weaken-party-allegiance-by-ending-straight-ticket-voting>.

<sup>170</sup> *Do You Have*, <http://www.msvoterid.ms.gov/PDF/Outreach%20Poster%20V2%20%284%29.pdf> (last visited Jan. 25, 2014).

that voter ID laws are necessary to prevent voter fraud, this Comment argues that this motive is illusory given that voter fraud is an insignificant problem in this county.<sup>171</sup> Moreover, the implementation of these laws so quickly after the *Shelby County* decision suggests that the laws' passage was at least partially motivated by racial animus.

Many critics say requiring a voter ID is discriminatory, because statistics show that people of color, on average, do not have proper government identification in the same numbers that white people do.<sup>172</sup> According to one 2012 report from the Brennan Center for Social Justice, “[n]early 500,000 eligible voters do not have access to a vehicle and live more than 10 miles from the nearest state ID-issuing office open more than two days a week. Many of them live in rural areas with dwindling public transportation options.”<sup>173</sup> Additionally, “[m]ore than 10 million eligible voters live more than 10 miles from their nearest state ID-issuing office open more than two days a week.”<sup>174</sup> The study also finds the voter ID laws are most harmful to people of color specifically:

1.2 million eligible black voters and 500,000 eligible Hispanic voters live more than 10 miles from their nearest ID-issuing office open more than two days a week. People of color are more likely to be disenfranchised by these laws since they are less likely to have photo ID than the general population.<sup>175</sup>... These voters may be particularly affected by the significant costs of the documentation required to obtain a photo ID. Birth certificates can cost between \$8 and \$25. Marriage licenses, required for married women whose birth certificates include a maiden name, can cost between \$8 and \$20. By comparison, the notorious poll tax —

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<sup>171</sup> Kahn & Carson, *infra* note 182.

<sup>172</sup> *Voter ID*, THE BRENNAN CENTER FOR SOCIAL JUSTICE, <http://www.brennancenter.org/analysis/voter-id>. (“Studies show that as many as 11 percent of eligible voters do not have government-issued photo ID. That percentage is even higher for seniors, people of color, people with disabilities, low-income voters, and students.”).

<sup>173</sup> Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CENTER FOR JUSTICE, [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

outlawed during the civil rights era — cost \$10.64 in current dollars.<sup>176</sup> ... The result is plain: Voter ID laws will make it harder for hundreds of thousands of poor Americans to vote. They place a serious burden on a core constitutional right that should be universally available to every American citizen.<sup>177</sup>

The above statistics demonstrate that voter ID laws significantly affect minority voters more so than white voters. That in and of itself should be reason enough to strike laws of this nature. Another reason to strike these types of laws, however, is that the problem these laws are designed to prevent—voter fraud—is virtually non-existent. In addition to the voter fraud discussed in Texas above,<sup>178</sup> a nation-wide study conducted by the Carnegie-Knight New21 Program has found that “voter fraud at the polls is an insignificant aspect of American elections. . . . There is absolutely no evidence that [voter impersonation fraud] has affected the outcome of any election in the United States, at least any recent election in the United States.”<sup>179</sup> For the study, News21 “sent thousands of requests to election officers in all 50 states, asking for every case of fraudulent activity including registration fraud, absentee ballot fraud, vote buying, false election counts, campaign fraud, casting an ineligible vote, voting twice, voter impersonation fraud and intimidation.”<sup>180</sup> The study found only ten cases of in person voter impersonation, which is the type of voter fraud the voter ID laws are designed to prevent.<sup>181</sup> There have been 146 million registered voters in the United States since 2000, so the ten confirmed cases of in-person voter fraud “represent one out of every 15

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Bingham, *supra* note 160.

<sup>179</sup> Eric W. Dolan, *In-person Voter Fraud ‘Virtually Non-existent’: Report*, THE RAW STORY (August 13, 2012), <http://www.rawstory.com/rs/2012/08/13/in-person-voter-fraud-virtually-non-existent-report/>, quoting David Schultz, professor of public policy at Hamline University School of Business.

<sup>180</sup> Natasha Khan and Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID is Needed*, NEWS 21 (August 12, 2012), <http://votingrights.news21.com/article/election-fraud/>.

<sup>181</sup> *Id.*

million prospective voters.”<sup>182</sup> It is curious that several states, states recently covered under Section Four of the Voting Rights Act, have begun implementing laws that place an inordinate burden on minorities and their right to vote, especially when the “problem” these laws are designed to prevent is basically non-existent.

Even prestigious judges who had previously held that voter ID laws are a valid exercise of state sovereignty have reversed course. Federal Appellate Judge, and well-respected legal scholar, Richard Posner held in 2007 that voter ID laws were constitutional.<sup>183</sup> He now claims, however, that he made a mistake: “I plead guilty to having written the majority opinion [in *Crawford v. Marion County Election Board*, a case that upheld Indiana’s voter ID requirement]. ... [That law is] a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”<sup>184</sup> Posner went on to state that had the lawyers arguing against the voter ID law in Marion County done a better job of presenting the undeniable fact that voter ID laws are just a subtler form of voter suppression, he would have held the voter ID law invalid: “We judges and lawyers, we don’t know enough about the subject matters we regulate, right? And if the lawyers would have provided us with a lot of information about the abuse of voter identification laws, this case would have been decided differently.”<sup>185</sup> With more states passing these restrictive laws, many judges and legal scholars realizing that the true goal of the legislation is not to prevent non-existent voter fraud, but to suppress the minority vote.

## **VII. A Twenty-First Century Voting Rights Act**

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<sup>182</sup> *Id.*

<sup>183</sup> *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (2007).

<sup>184</sup> Richard A. Posner, *Reflections on Judging* (Harvard University Press, 2013).

<sup>185</sup> Telephone Interview by Mike Sacks with Richard Posner, Judge, United States Court of Appeals for the Seventh Circuit, in (Oct. 11, 2013).

As previously mentioned, the majority does not feel the decision is that significant because it left in place Section Two as a remedy to combat instances of discriminatory voting laws.<sup>186</sup> But Section Two is an insufficient remedy, on its own, to stop states from instituting voting procedures that will disproportionately affect minority voters.<sup>187</sup> As noted above, states formerly covered have already begun to institute laws that will undo all of the progress made under the Voting Rights Act.<sup>188</sup> As such, Congress needs to pass a new pre-clearance formula. The new pre-clearance formula should give the Department of Justice as much power as it had previously to block discriminatory voter laws before they go into effect. While registration numbers are important (they were a main part of the pre-clearance formula before), the formula should also cover areas where intentional vote dilution has occurred through the redrawing of district lines and the proliferation of at large voting systems. Such protective coverage can be identified using statistics: if a large number of minority voters occupy a political subdivision, yet no minority is ever elected to represent them over a period of many years, this should be evidence of vote dilution.

Finally, the new pre-clearance formula should include a bail out provision for states that have demonstrated a long adherence to equality in voting. The bailout was working before; “[n]early 200 jurisdictions have successfully bailed out of the pre-clearance requirement, and the DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984.”<sup>189</sup> The bailout provision should stay as it was: a jurisdiction can bail out if it demonstrated it

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<sup>186</sup> *Shelby Cnty.*, *supra* note 76.

<sup>187</sup> *Shelby Cnty.*, *supra* note 77.

<sup>188</sup> *See* Part VI-D *supra*.

<sup>189</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J. dissenting).

has not instituted or attempted to institute any discriminatory voting procedures for ten years.<sup>190</sup>

### **VIII. Conclusion**

The Supreme Court's decision to strike the Section Four pre-clearance formula of the Voting Rights Act is not only a disturbing judicial intervention against the will of the people, it also carries with it wide-ranging effects that will undoubtedly undo much of the social progress made in the last fifty years. The reasons the majority in *Shelby County* gave for the decision are inadequate and, upon closer examination, do not tell the whole story. It is up to Congress to act swiftly and restore one of the most important laws in American legislative history.

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<sup>190</sup> *Id.*